FILE COPY

Office Supreme Court, U.S.
FEB 13 1933
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 537.

(Certiorari Granted January 9, 1933, 287 U. S. .)

ARTHUR C. HARVEY COMPANY

vs.

JOHN F. MALLEY and/or MALCOLM E. NICHOLS,
former Collectors of Internal Revenue.

BRIEF OF AMICUS CURIAE.

DANIEL AUSTIN SHIRK,
Amicus Curiae,
No. 170 Broadway,
New York City.

THE COURT PRESS, INC.

INDEX.

PAGE

Statement 1

Questions Presented 2

Summary of Argument 2

Argument

I. A collector may be sued in an action to recover an over payment of income taxes collected by him and based upon an allowed claim 3

II. Revised statute §3226 has no application where the action is based on an allowed claim 12

Table of Authorities.

Cases:

Arnson v. *Murphy*, 109 U. S. 238 ..... 4, 13

Barney v. *Rickard*, 157 U. S. 352 4
Bertelsen & Petersen Eng. Co. v. *United States*, 60 F. (2d) 745..... 11
Bonwit Teller & Co. v. *United States*, 283 U. S. 258....2, 5, 8, 9, 10, 11, 12, 13
Bonwit Teller & Co. v. *United States*, 52 F. (2d) 904; cert. denied 285 U. S. 538 9
Brady v. *United States*, 24 F. (2d) 205 3

Cary v. *Curtis*, 3 How. 236 4
Collector v. *Hubbard*, 79 U. S. (12 Wall.) 1, 12 ..... 4, 5

Davies v. *Miller*, 130 U. S. 284 4
DeLima v. *Bidwell*, 182 U. S. 1, 178 4
Dooley v. *United States*, 182 U. S. 222 ..... 6, 11

Elliott v. *Swartwout*, 10 Peters 137 4

Girard Trust Co. v. *United States*, 270 U. S. 163 6

Moses v. *United States*, 61 F. (2d) 791 ..... 3, 11

National Tool Co. v. *Routzahn*, 28 F. (2d) 914 3
New England Mutual Life Ins. Co. v. *United States*, 52 F. (2d) 1006 10

Peerless Paper Box Co. v. *Routzahn*, 22 F. (2d) 459 3
Philadelphia v. *Collector*, 72 U. S. (5 Wall.) 720 4

Routzahn v. *Reeves Brothers Co.*, 59 F. (2d) 915, cert. denied 287 U. S. 6

Sage v. *United States*, 250 U. S. 33 ..... 4, 6
Smietanka v. *Indiana Steel Co.*, 257 U. S. 1 6
Spalding v. *Vilas*, 161 U. S. 483 10

Union Trust Co. v. *Wardell*, 258 U. S. 537 6
United Motors Corp. v. *United States*, 44 F. (2d) 407 3
United States v. *Boston Buick Co.*, 282 U. S. 476 14
United States v. *Emery, Bird Thayer Realty Co.*, 237 U. S. 28..... 7

PAGE

United States v. *Hvoslef*, 237 U. S. 1 7
United States v. *Kaufman*, 96 U. S. 567 .....6, 7, 12
United States v. *Michel*, 282 U. S. 656 14
United States v. *Pfitsch*, 256 U. S. 547 11
United States v. *Savings Bank*, 104 U. S. 728 .....7, 12
United States v. *Swift & Co.*, 282 U. S. 468 14

Williamsport Wire Rope Co. v. *United States*, 277 U. S. 551..... 12

STATUTES:

Revised Statutes
Sections 3182, 3183 .....6, 10
Section 3226; 26 U. S. C. Section 156 .....2, 4, 6, 9, 12, 14
Sections 771, 989, 3210, 3219, 3220, 3224, 3227 ..... 5, 7

Judicial Code
Section 24 (5); 28 U. S. C. Section 41 (5) 2, 8
Section 177; 28 U. S. C. Section 284 9

Revenue Act of 1926
Section 1122 (c), c. 27, 44 Stat. 9; 28 U. S. C. Section 41 (20);
Section 24 (20) Judicial Code 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 537.

(Certiorari Granted January 9, 1933, 287 U. S. .)

ARTHUR C. HARVEY COMPANY

vs.

JOHN F. MALLEY and/or MALCOLM E. NICHOLS, former Collectors of Internal Revenue.

BRIEF OF AMICUS CURIAE.

Statement.

The *amicus curiae* is the attorney for the taxpayer in case of *Pathe Exchange, Inc.* v. *Edwards and Bowers*, former collectors, now pending in the United States District Court, Southern District of New York, in which the decision on a motion for judgment is being held in abeyance, pending the decision of this Court herein.

The brevity of the record and the statement of facts by the parties, make it unnecessary to set them forth in detail in this brief.

One of the causes of action alleged in the declaration upon which the suit is founded, is to recover an overpayment of income taxes paid to former Collector Malley, based upon a claim timely filed and duly allowed by the Commissioner of Internal Revenue and evidenced by his certificate of overassessment issued to the taxpayer (R. 3-8).

Questions Presented.

1. Whether the collector to whom the taxes were paid may be sued in an action to recover an overpayment of the taxes so paid where a refund claim has been timely filed by the taxpayer and duly allowed by the Commissioner of Internal Revenue and evidenced by his certificate issued to the taxpayer.

2. Whether §3226 of the Revised Statutes, as amended by 26 U. S. C. §156 (§1113 (a) of the Revenue Act of 1926) applies to this suit.

Summary of Argument.

1. The collector who receives the taxes may be sued in an action to recover an overpayment of the taxes erroneously paid and based upon an allowed claim just as he is suable in the case of a rejected claim. The right to sue a collector was given by the common law. The liability of the Collector, although regulated, is not one created by statute. There is no special remedy provided by statute for cases involving allowed claims. The argument that only the United States may be sued is based upon the inadmissible premise that there is a statute which provides an exclusive remedy. The statute authorizing suits against the collector in the district courts, 28 U. S. C. §41 (5), by its terms does not specifically prohibit suits based upon allowed claims. It specifically applies to "*all* cases arising under any law providing for internal revenue".

2. The contention that the suit is barred because it was not commenced within five years from the date of payment of the tax as required by R. S. §3226, is unsound and in direct conflict with *Bonwit Teller & Co.* v. *United States*, 283 U. S. 258. The section does not apply to allowed claims. It provides for a short statute of limitations of two years

in case of *disallowed* claims, but is silent on the period of time within which a taxpayer may sue in the case of an allowed claim. The general statute of limitations applies. The taxpayer's cause of action accrued either on February 18, 1924, the date the Commissioner signed the Schedule of Refunds and Credits, or, on or about May 16, 1924, the date the certificate of overassessment was issued to the taxpayer. Until either one of said dates, no suit could properly have been commenced by the taxpayer. This action was commenced within the period prescribed by law.

ARGUMENT.

I.

A collector may be sued in an action to recover an overpayment of income taxes collected by him and based upon an allowed claim.

It is contended by the government that where a taxpayer has erroneously overpaid his income tax and has filed a timely claim for refund with the Commissioner of Internal Revenue who has allowed the claim and issued his certificate showing the allowance to the taxpayer, the sole remedy of the taxpayer to recover the amount allowed, is a suit against the United States in the Court of Claims and not an action against the Collector.[1] Several courts have assumed that the collector or under certain conditions the United States may be sued in the district court.[2]

[1] This is the holding in *Moses* v. *United States*, 61 F. (2d) 791 (C. C. A. 2). In the case at bar the court below did not state specifically that only the Court of Claims had jurisdiction, 60 F. (2d) 97, 100, but the Court in the *Moses* case, so construed it. 61 F. (2d) 793.

[2] See *Peerless Paper Box Co.* v. *Routzahn*, 22 F. (2d) 459; *National Tool Co.* v. *Routzahn*, 28 F. (2d) 914; *Brady* v. *United States*, 24 F. (2d) 205; *United Motors Corp.* v. *United States*, 44 F. (2d) 407. The latter two cases were expressly overruled by *Moses* v. *United States*, *supra*.

The right to sue a collector for an illegal or erroneous collection was given by the common law. It is in the nature of an action *indebitatus assumpsit* for money had and received and the law implied a promise to repay. *Elliott* v. *Swartwout*, 10 Peters 137; *Philadelphia* v. *Collector*, 72 U. S. (5 Wall.) 720, 730-2; *Collector* v. *Hubbard*, 79 U. S. (12 Wall.) 1, 12.[3]

The right to sue is not a creature of the statute. It is true that the common law right has been regulated and modified by statute. Now the tax need not be paid under protest or duress; a preliminary claim for refund must first be filed with the Commissioner of Internal Revenue; the taxpayer must await the determination of the Commissioner for a definite period of time before action may be commenced. Rev. Stat. §3226, as amended 26 U. S. C. §156;[4] *Sage* v. *United States*, 250 U. S. 33, 37.

In addition to the common law right, the reasonable implication of the statutes is that the taxpayer may main-

---

[3] The leading case of *Elliott* v. *Swartwout, supra*, was a *customs* case. By statute, the common law action against the Collector in a customs case was taken away. See *Cary* v. *Curtis*, 3 How. 236; *Arnson* v. *Murphy*, 109 U. S. 238, 243; *Davies* v. *Miller*, 130 U. S. 284, 286; *Barney* v. *Rickard*, 157 U. S. 352, 356-8. This Court recognized the distinction between customs cases and internal revenue cases in *DeLima* v. *Bidwell*, 182 U. S. 1, 178.

[4] Revised Statutes, §3226, as amended by 26 U. S. C. §156; §1113 (a) Revenue Act of 1926, is in part as follows:

> §3226. No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time * * *."

tain an action against the Collector. *Collector* v. *Hubbard*, *supra*; Rev. Stat. §§3220, 989.[5]

It is said by the government that the foregoing authorities and statutes do not permit an action against the collector where the claim has been allowed; that they have reference to an action based upon a rejected claim; that where the claim has been allowed and a certificate issued, the action is *not* one to recover a tax or a sum erroneously paid under the internal revenue law; that it is an action to recover a sum of money upon an account stated or a promise to pay by reason of the certificate issued; that the collector had nothing to do with the issuance of the certificate, was not privy to any promise therein contained, either express or implied, to refund the overpayment. The case of *Bowcit Teller & Co.* v. *United States*, 283 U. S. 258, 265, has been cited by the Court below in support of these propositions.[6]

It is respectfully submitted that the contentions advanced are based upon misconception of the nature of the action against the collector and the effect of the statutes thereon; that they are in conflict with the principles enunciated in the *Bowcit Teller* case; and that no distinction in law exists, with respect to the nature of the action against

[5] Revised Statute, §3220 as amended, 26 U. S. C. §149 Revenue Act of 1928, §3 reads in part:

"Except as otherwise provided by law in the case of income, war profits, excess profits, estate and gift taxes, the Commissioner of Internal Revenue * * * is authorized * * * also to repay to any Collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal revenue taxes collected by him."

Revised Statute, §989; 28 U. S. C. §842 reads in part:

"When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him and by him paid into the Treasury, in the performance of his official duty, and the court certifies that there was probable cause for the act done by the collector, or other officer * * *, no execution shall issue against such collector * * * but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury."

See also R. S., §§3219, 3224, 3226, 3227, 3210 and 771.

[6] See opinion 60 F. (2d) 97, 100.

the collector, whether it be based upon an allowed claim or upon a rejected claim; and that there is no statute, so far as can be determined, which makes such a distinction or which provides a special remedy for a case of an allowed claim.

The duties of a collector are prescribed by statute (R. S. §3183). His principal duty is to collect taxes.

The duties of the Commissioner are prescribed by statute (R. S. §§3182, 3183). He is the only official in the Treasury Department possessing the power to allow or reject a claim for refund. *Girard Trust Co.* v. *United States*, 270 U. S. 163.

The argument of the government makes the *character* of the Commissioner's determination the decisive factor whether the collector may be sued. We submit that the common law liability of the collector was never made dependent upon the *character* of the Commissioner's determination; nor have the statutes modified it to that extent. His liability attaches when he receives the money. It is true the liability at first is only contingent. The statute (R. S. §3226) has provided the conditions under which this liability may become absolute. The basis of the action against the collector is his receipt of the tax and is personal to him.[7] Nowhere is there to be found a requirement that the basis of the action is dependent upon the character of the Commissioner's determination.

Diligent effort has disclosed no statute providing a special remedy to a taxpayer where the claim has been allowed, but not paid. If there were such a statute, it is conceded the remedy would be exclusive.[8] *United States* v.

---

[7] See *Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1, 4, 5; *Sage* v. *United States*, 250 U. S. 33, 37; *Union Trust Co.* v. *Wardell*, 258 U. S. 537, and *Routzahn* v. *Reeves Brothers Co.*, 59 F. (2d) 915, C. C. A. 6; certiorari denied 287 U. S.

[8] See cases footnote 2, *supra*, where a special remedy has been fixed by statute in customs cases; also *Dooley* v. *United States*, 182 U. S. 222, 225.

Kaufman, 96 U. S. 567, 569; *United States* v. *Emery, Bird Thayer Realty Co.*, 237 U. S. 28, 31. In the latter case, the government contended that the Collector should have been sued. This Court said (p. 31):

> "The objection to the jurisdiction pressed by the Government is that the only remedy is a suit against the Collector. As the United States has received and keeps the money and would indemnify the Collector if he had to pay (Rev. Stat. 3220), the least that can be said is that it would be adding a fifth wheel to the coach to require a circuitous process to satisfy just claims. It is true that this tax law provides that 'all laws relating to the collection, remission and refund of internal revenue taxes, so far as applicable' &c. are extended to this tax, c. 61, §38, 36 Stat. 11, 117, but that is far from the case of a statute creating a new right and a special remedy to enforce it in such form as to make the remedy exclusive. The right to sue the Collector for an unjustified collection was given by the common law."

It is also insisted that this Court in *United States* v. *Savings Bank*, 104 U. S. 728, indicated that a collector may not be sued on an allowed claim.[9] We submit that this Court had before it in that case the single question of jurisdiction of the Court of Claims in the case of an allowed claim. The government's contention would result in converting the word "may" used in the opinion, to read "must". This Court in *United States* v. *Hvoslef*, 237 U. S. 1, upheld the jurisdiction of the district court in an action against the United States based on a rejected claim, notwithstanding that the government insisted no action could be maintained against the United States on a rejected claim, citing as authority the *Savings Bank* case.[10]

---

[9] "A rejected claim *may* be prosecuted against the collector, and an allowed claim not paid, *may* be sued for in the Court of Claims." *United States* v. *Savings Bank*, 104 U. S. 728, 734. (Italics supplied.)

[10] *United States* v. *Hvoslef*, 237 U. S. 1, at page 2; see *United States* v. *Emery, Bird, Thayer Realty Co.*, *supra*.

The district courts are invested with jurisdiction "of all cases arising under any law providing for internal revenue". §24 (5) Judicial Code as amended; 28 U. S. C. §41 (5).[11] There is an exception applicable only to customs cases for which an exclusive remedy has been provided by statute. This statute, by its terms, seems to cover "all cases" arising under the internal revenue laws.

We submit that the case at bar is one arising under the internal revenue law. The declaration draws in question the provisions of various internal revenue acts and reference thereto is necessary to a decision on the merits.

In the *Bouvit Teller* case, *supra*, on which the Court below relied, this Court said at page 259:

> "This action was brought to recover the amount of an overpayment of income tax for the year ended January 31, 1919, as determined by the Commissioner of Internal Revenue and shown in his certificate No. 990,988 issued to plaintiff May 12, 1927."

And at page 265, this Court said:

> "* * * Plaintiff pleads its claim in two forms. The first is based upon the issue and delivery of the Commissioner's certificate showing plaintiff entitled to a refund in the amount specified. The second alleges an account stated showing that there is due plaintiff the amount claimed. *The action is not for the overpayment of the tax in 1919, but is grounded upon the determination evidenced by the certificate*

---

11 This section reads:

"The District Courts shall have original jurisdiction as follows:

'Cases under Internal Revenue, customs and tonnage laws.—Of all cases arising under any law providing for internal revenue, or from revenue from imports or tonnage, except those cases arising under any law providing revenue from imports, jurisdiction of which has been conferred upon the Court of Customs Appeals.'"

issued by the Commissioner May 12, 1927. Upon delivery of the certificate to plaintiff, there arose the cause of action upon which this suit was brought." (Italics supplied.)

The government emphasizes the italicized portion of the foregoing quotation as indicating a ruling by this Court that an action on an allowed claim evidenced by a certificate, is not a suit to recover taxes. In its brief in the *Bonwit Teller* case, the government took a contrary position.[12] After the *Bonwit Teller* case was remanded to the Court of Claims, the question of interest was strenuously litigated. That court upheld the taxpayer's right to interest from the date of payment of the tax, 52 F. (2d) 904, and the petition of the government for certiorari, was denied. 285 U. S. 538.

It is submitted that the allowance of a claim and the issuance of a certificate does not convert the action into one on contract. The *accrual* of the taxpayer's cause of action did not exist at the time he paid the tax. The statute requires forbearance until the Commissioner has acted. When his action is final, as evidenced by a certificate when the determination is favorable, the cause of action accrues. Nothing to the contrary, we believe, was intended

---

[12] There the government stated:

"Similarly the instant suit may be on an account stated, if it is assumed that the Commissioner had authority to allow the claim for refund. *But it is also a suit for the recovery of taxes,*[3] and on such ground the United States may be sued only as it has consented to be sued, namely, within the limited period of time prescribed by §3226." (Italics supplied.)

"[3] That this is the character of this proceeding is indicated by the prayer for interest in the petition in the court below (R. 1) seeking interest from July 10, 1919, the date of alleged overpayment. On the account stated theory no interest would be allowable against the United States (Jud. Code, §177; U. S. C. title 28, §284); if it were allowable, it would run only from March 8, 1927, the date of allowance and accrual of any contractual right of action."

by this Court in the *Bonwit Teller* case. The government's insistence in that case that a claim for refund, which is a familiar requirement in tax actions, was not filed, appears inconsistent with its present contention that the action is not to recover a tax.

The Court below stated that the collector had nothing to do with the issuance of the certificate. This is undoubtedly true but the statute requires the Commissioner, not the collector, to pass upon the claim and to issue the certificate (R. S. §§3182-3). Similarly, in the case of a rejected claim, it is the Commissioner's determination which is the condition precedent before action may be commenced against the collector. Under no circumstances may the Commissioner be sued to obtain a refund of taxes. *Spalding* v. *Vilas*, 161 U. S. 483, 498, 499. There is nothing that the collector does in the case of a rejected claim which he does not do in the case of an allowed claim.

The ruling of the court below, which we say is erroneous, was adopted by the Circuit Court of Appeals for the Second Circuit and was used as a basis of construing the amendment to the Tucker Act,[13] in holding that the United States

---

[13] Revenue Act of 1926, §1122 (c), c. 27, 44 Stat. 9, reads as follows:

> "(c) The paragraph added by §1310 of the Revenue Act of 1921 at the end of paragraph Twentieth of §24 of the Judicial Code, relating to the jurisdiction of district courts, as amended, is re-enacted without change, as follows:
>
> 'Concurrent with the Court of Claims, of any suit or proceeding, commenced after the passage of the Revenue Act of 1921, for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected, under the internal revenue laws, even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced.'"

See *New England Mutual Life Ins. Co.* v. *United States* (Ct. Cl.) 52 F. (2d) 1006, 1008.

may not be sued in the district court where the basis of the action is the allowance of a claim.[14]

We respectfully urge that there is no warrant for making a distinction between an action against the collector based on an allowed claim and one based on a rejected claim. The taxpayer, we submit, may sue the collector or the United States in the Court of Claims[15] and where the collector who collected the tax is dead or retired, the suit may be against the United States in the district court, irrespective of whether the claim was allowed or rejected. We submit there can be no question that the Court of Claims has jurisdiction of a proceeding based on an al-

---

[14] *Moses* v. *United States*, 61 F. (2d) 791, 793. In this action, it was pleaded and proved that the collector who collected the tax was out of office at the commencement of the action. The Court said:

> "This condition makes apparent the intent of the legislation, namely, to permit suit against the United States as an alternative to a suit against a deceased or retired collector. Of suits against a collector the district court already had jurisdiction unlimited as to amount. Jud. Code §24 (5) (28 U. S. C. A. §41 (5)) * * * We think it clear that the suits allowed under the amendment must be of the same kind as those for which they are a substitute. In other words, after the amendment, if the collector by whom the tax was wrongfully collected is still in office, the suit must, as before, be brought against him, if the claim exceeds $10,000; but if he is out of office, then it may be brought in the District Court against the United States regardless of the amount claimed. Hence, unless the plaintiff's suit is one that could be brought against a collector, it is not within the jurisdiction conferred on District Courts by the amendment."
>
> "Accepting the appellants' theory of their suit the cause of action is grounded upon the commissioner's determination evidenced by his certificate of overassessment. *Bonwit Teller & Co.* v. *United States*, 283 U. S. 258, 265. The liability of the United States rests upon an implied promise to pay the allowed refund. *United States* v. *Savings Bank*, 104 U. S. 728, 733; *United States* v. *Kaufman*, 96 U. S. 567, 570. But no such cause of action can arise against a collector. He can neither allow a refund nor draw money from the Treasury to pay it. Hence no suit will lie against him based on the allowance of a refund."

See *Bertelsen & Petersen Eng. Co.* v. *United States*, 60 F. (2d) 745 (C. C. A. 1), decided after the case at bar; *United States* v. *Pfitsch*, 256 U. S. 547.

[15] See *Dooley* v. *United States*, 182 U. S. 222, 225.

lowed claim.[16] We contend that whatever jurisdiction is possessed by the Court of Claims is also possessed by the district courts in actions against the collector and in actions against the United States under the Tucker Act, as amended.[17]

II.

Revised statutes §3226 has no application where the action is based upon an allowed claim.

The government insists that since the case at bar was commenced more than five years from the date of the payment of the 1918 tax, R. S. §3226 as amended 26 U. S. C. §156,[18] is a complete bar.

The proof is incontrovertible that the claim filed by the taxpayer (R. 47) was timely filed (R. 48) pursuant to §252 of the Revenue Act of 1921 in force and effect in 1923 and duly allowed as evidenced by the Schedule of Overassessments (R. 37), the Schedule of Refunds and Credits (R. 37) and the Certificate of Overassessment (R. 31).

In the *Bonwit Teller* case, *supra*, this Court had the

---

[16] See *United States* v. *Kaufman*, 96 U. S. 567; *United States* v. *Savings Bank*, 104 U. S. 728; *Bonwit Teller & Co.* v. *United States*, 283 U. S. 258.

[17] See *Williamsport Wire Rope Co.* v. *United States*, 277 U. S. 551, 561. The Court said:

> "Moreover, whatever jurisdiction is possessed by the Court of Claims to review determinations under §§327 and 328 would be possessed also by the District Courts in suits against collectors and in actions against the United States under Section 24 (20) of the Judicial Code."

[18] "No suit * * * for the recovery of any internal revenue alleged to have been erroneously or illegally assessed or collected * * * shall be begun * * * after the expiration of five years from the date of the payment of such tax * * * unless such suit * * * is begun within two years after the disallowance of the part of such claim to which such suit * * * relates * * *."

occasion to pass on the very same contention. There the Court said at page 265:

> "The Government further contends that, even if the Commissioner's allowance was authorized, this suit is barred by R. S. §3226, as amended 26 U. S. C. §156. It provides that no suit for the recovery of any internal revenue tax alleged to have been erroneously collected shall be begun after five years from the payment of such tax. The overpayment made was more than five years before the complaint was filed. This case is not within the clause giving two years after disallowance because here the claim was allowed. * * * Upon delivery of the certificate to plaintiff, there arose the cause of action on which this suit was brought. *United States* v. *Kaufman*, 96 U. S. 567, 570; *United States* v. *Savings Bank*, 104 U. S. 728; *Bank of Greencastle's Case*, 15 C. Cls. 25. There is no merit in the contention that the suit is barred."

In the case of *Arnson* v. *Murphy*, 109 U. S. 238, this Court had before it a statute similar to R. S. §3226. The Court said (pp. 242, 243):

> "It appears to us quite plain, that no action arises to the claimant, in such cases, until after a decision against him by the secretary of the treasury; and that his suit against the collector is barred unless brought within ninety days after an adverse decision upon his appeal but with the proviso, that if such decision is delayed more than ninety days after the date of his appeal, it is at the claimant's option either to sue, pending the appeal, treating the delay as a denial, or to wait until a decision is in fact made, and then sue within ninety days thereafter. It cannot be said that he is obliged, in case for any reason a decision at the Treasury Department is delayed beyond the appointed time, to treat the delay as an adverse decision, and to bring his suit

> while the matter is *sub judice*. There is no language in the act requiring such a conclusion, it is inconsistent with the terms actually employed, and is not founded on any sufficient reason. * * * There is nothing to forbid his waiting, without suit, as long as he has reason to expect a favorable decision upon his appeal."

In the case at bar, the right of the plaintiff to commence his action did not accrue until the Commissioner had passed upon its claim. This Court has held that the date of allowance of a claim, for the purpose of construing whether interest was payable under the various revenue acts, is the date that the Commissioner signed the Schedule of Refunds and Credits.[19] In the case at bar, the Schedule of Refunds and Credits (R. 37) was signed on February 18, 1924. This action was commenced on or about February 3, 1930 (R. 2). The certificate of overassessment was issued on or about May 16, 1924 (R. 55). No matter which date is considered in determining when plaintiff's time to commence suit started to run, the action was brought in time.

It may be observed that R. S. §3226 provides for a short statute of limitations of two years in the case of a rejected claim. This Court has held that the action must be commenced within two years from the date of rejection, irrespective of whether notice of rejection has been given to the taxpayer.[20] It seems that the statute is completely silent, however, on the period of time within which a taxpayer may sue in the case of an allowed claim. We urge that the general statute of limitations is for that reason applicable. We submit that there is no merit in the claim that the suit is barred.

Respectfully submitted,

DANIEL AUSTIN SHIRK,
Amicus Curiae.

---

[19] *United States* v. *Swift & Co.*, 282 U. S. 468; and *United States* v. *Boston Buick Co.*, 282 U. S. 476.

[20] *United States* v. *Michel*, 282 U. S. 656.